82-107

NO.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN B. MILES
Appellant,

v.

THE SHUR-GOOD BISCUIT CO., INC.
and DONALD C. SCHMITT
Appellees.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

JOHN B. MILES, Pro se
3816 Roswell Avenue
Cincinnati, Ohio 45211
(513) 661-2851

QUESTION PRESENTED

Does the withholding of relevant evidence under a protective order of the Court and the denial of a trial on an action in Tort, violate a fundamental right to due process of law under ARTICLE XIV, Sec. 1, of the United States Constitution?

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IN THE

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Appellant,

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THE SHUR-GOOD BISCUIT CO., INC.
and DONALD C. SCHMITT

Appellees.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

This case comes on appeal from the Supreme Court of Ohio which dismissed the appeal as of right from the Court of Appeals, First Appellate District, Hamilton County, Ohio, for the reason that no substantial constitutional question exists herein.

JURISDICTION

This action was originally filed in the Court of Common Pleas, Hamilton County, Ohio. The complaint alleged wrongful discharge, humiliation and intimidation.

Summary judgment was entered in favor of the Appellees on December 23, 1980. A notice of appeal was filed on January 15, 1981, and on December 30, 1981, the Court of Appeals, First Appellate District, Hamilton County, Ohio, affirmed the judgment of the Court below. A notice of appeal was filed on January 22, 1982, to the Supreme Court of Ohio, which dismissed the appeal on April 7, 1982. A notice of appeal to the Supreme Court of the United States was filed on April 21, 1982, in the Supreme Court of Ohio and the Court of

Appeals, First Appellate District of Ohio, Hamilton County, Ohio.

ASSIGNMENT OF ERROR APPEALED FROM THE COURT OF APPEALS

Third assignment of error:

> The trial judge was in error in not finding that there were grounds for trial on the suit for punitive damages resulting from the intimidation and humiliation suffered by the Secretary/Treasurer of the Company at the time of the invasion by the Defendant, Donald C. Schmitt, and others on the morning of July 16, 1979.

STATEMENT OF THE CASE

Facts

On the sixteenth day of July, 1979, the Appellant--then the Secretary/Treasurer of The Shur-Good Biscuit Co., Inc.--in the presence of peers and co-workers, was railroaded from the Corporation's premises in a disgraceful and humiliating manner and under extreme intimidation by Donald C. Schmitt, Thomas Conlan and at least two other persons whose identity remains unknown to the Appellant.

Issue

When persons combine together to do acts which they know will cause loss to the Plaintiff, he can sue if either the object of their conspiracy is unlawful or they use unlawful means to achieve it, the House of Lords in Rooks v. Bernard (1964), 1 All E.R. 367.

Decisions by the Trial Court and the Court of Appeals

The trial judge did not find any grounds for an action on the torts of intimidation and humiliation and the decision was affirmed by the Court of Appeals.

ARGUMENT

The Appellant's cause has been quashed without the evidence ever being presented to the trial court or the testimony of witnesses ever being heard. The Appellant has been denied his fundamental right to a trial and he has been denied his right to due process of law.

The Appellant attempted to obtain evidence held by the Appellees by Duces Tecum Subpoena and to obtain the testimony of certain employees of The Shur-Good Biscuit

Co., Inc., but Appellees were granted a protective order. Yet, the trial court accepted into evidence the Appellees affidavits and memorandums. These were refuted as inaccurate and false by Appellant's own affidavits and memorandums.

The Appellant tried in vain to get the evidence presented and to have the testimony of witnesses heard.

It was wrong for the trial judge to grant a protective order against Appellant,s obtaining vital evidence and then to render judgment in Appellees favor without a trial. Where the evidence is in itself illegal or where it was obtained by illegal means, the parties holding such evidence can not turn to the law for protection. Lord Truro L.C. said in Benyon v. Nettlefold (1850) 3 Mac. & G. 94, "those who violate the law must not apply to the law for protection."

The invasion, seizure and improper discharge upon which this case is brought, centers upon the fact that the Appellant was conducting an inquiry into the "close" of the predecessor corporation, The Shur-Good Biscuit Co. The Appellant had locus standi to conduct that inquiry and had requested information from the Appellee, Donald C. Schmitt and his attorney, Thomas Conlan as to the legality of the take-over of that Corporation's assets against the restrictions framing that "close". He was still waiting for that information when, on the morning of July 16, 1979, Donald C. Schmitt, Thomas Conlan and at least two other persons whose identity remains unknown to the Appellant, forced his removal from the premises of The Shur-Good Biscuit Co., Inc.

For the Court to permit the Appellees

to defeat Appellant's cause on inaccurate information, while at the same time withholding evidence so as to cover up the truth is a disregard for the law.

In U. S. v. Nixon (1974), 418 U.S. 683, the Supreme Court ordered the President to deliver the tapes to the special investigator in the Watergate tapes case. The Court reasoned that even the President while in office is not at liberty to disregard the law. When Presidential privilege was claimed for the tapes, the Court held that this claim had to be considered "in the light of our historic commitment to the rule of law."

The fundamental right to a trial and the right to due process of law has always been recognized under our system of jurisprudence and is guaranteed under the American Constitution; yet, the Appellant has

been denied these rights.

The Fourteenth Amendment to the Constitution of the United States provides that "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

In Dartmouth College v. Woodward, 4 Wheat. 518 (U.S.), Daniel Webster in his argument gave this definition of Due Process of Law: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society."

In Hagar v. Reclamation District, 4 Sup. Ct. 663, at P. 667, it is apparent that the due process of law guaranteed in the Fourteenth Amendment as against state infringement refers in its broadest scope to something more than forms of procedure. "What constitutes that process, it may be difficult to define with precision so as to cover all cases. It is, no doubt, wiser, as stated by Mr. Justice Miller, in Davidson v. New Orleans, to arrive at its meaning 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' (96 U.S., 97, 104.) It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties affected. It must

be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observances of those general rules established in our system of jurisprudence for the security of private rights."

CONCLUSION

The foregoing considered, this Court should note probable jurisdiction in order to protect the Appellant's right to Due

Process of Law and to have his cause heard according to the rules of Natural Justice.

Respectfully submitted,

JOHN B. MILES, Pro se
3816 Roswell Avenue
Cincinnati, Ohio 45211
(513) 661-2851

CERTIFICATE OF SERVICE

I hereby certify that three copies of appellant's Jurisdictional Statement were served by deposit in a U.S. post office box for first class mail, with postage prepaid, upon counsel for all parties required to be served: Thomas L. Conlan, 440 Central Trust Tower, Cincinnati, Ohio 45202, on the 16th day of July 1982, in accordance with the provisions of Rule 28.

John B. Miles

APPENDIX A

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

JOHN B. MILES Plaintiff-Appellant, vs. THE SHUR-GOOD BISCUIT CO., INC. and DONALD C. SCHMITT, Defendants-Appellees.	NO. C-810046 DECISION

Mr. John B. Miles, Pro se, 3816 Roswell Avenue, Cincinnati, Ohio 45211,

Mr. Thomas L. Conlan and Ms. Patricia M. Shepherd, 440 Central Trust Tower, Fourth and Vine Streets, Cincinnati, Ohio 45202, for Defendants-Appellees.

PER CURIAM.

This cause came to be heard upon the appeal, the transcript of the docket,

journal entries and original papers from the Court of Common Pleas, Hamilton County, Ohio, the transcript of the proceedings, the briefs and the arguments of counsel.

The record reveals that the trial judge granted appellee's motion for summary judgment upon consideration of the pleadings, appellee's deposition, affidavits for and against the motion, memoranda submitted, and oral argument. Appellant has timely filed this appeal from the trial court's granting of appellee's motion for summary judgment.

The record discloses that appellant was employed by the Shur-Good Biscuit Co., Inc. and its predecessor, the Hamilton Baking Co., from 1966 until July 16, 1979. On the latter date Donald C. Schmitt, president of the corporation, called appellant into his office and presented

him with a letter of dismissal. Also present at the time were Thomas L. Conlan, a director and attorney for the company, and another officer of the company. Appellant was directed to gather his personal belongings and vacate the premises or be considered a trespasser. At that time appellant protested the legality of his discharge but did vacate the premises. The letter of dismissal stated that he would receive payment of his salary to the date of dismissal, unused vacation pay, and one month's severance pay. The following day appellant received $900.00 in salary through the date of discharge, $830.00 in vacation pay, and $1,800.00 for one month's severance pay. At the time of his discharge appellant was serving as secretary-treasurer of the corporation and was employed without

contract at the pleasure of the corporate board of directors. Prior to July 16, 1979, the board of directors gave their assent to appellant's dismissal, and the corporate records show their subsequent formal ratification of the act.

The first four assignments of error can be considered as stating that the trial court erred in not determining that appellant's dismissal was prohibited by Ohio corporation law and was a breach of appellant's contract rights. We do not agree.

Appellant was clearly employed under an implied contract terminable at will. In Ohio employment for an indefinite term is an employment at will which may be terminated by either party at any time with or without cause or reason.

In addition, Schmitt's dismissal of

appellant was within the scope of his authority as an officer of the corporation. R.C. 1701.64(B)(1) states:

> All officers, as between themselves and the corporation, shall respectively have such authority and perform such duties as are determined by the directors.

Ohio law is clear that the delegation of authority to an officer may be by formal action, by course of dealings, by acquiescence, and by ratification of a previously authorized act. In the case sub judice, Schmitt canvassed the board of directors prior to appellant's dismissal. The board later unanimously passed a formal resolution ratifying the discharge.

Appellant complains that the trial court should have awarded him punitive damages for mental suffering as a result of his dismissal. We do not agree with this position as the record does not show

that appellees committed a willful or independent tort, the standard fundament necessary to recover punitive damages. Appellees did not use force or touch appellant at the time of his dismissal.

Appellant claims contract rights by virtue of his election by the board of directors to the position of secretary-treasurer. R.C. 1701.64(B)(2) provides in pertinent part:

> The election or appointment of an officer for a given term, or a general provision in the articles, the regulation, or the bylaws with respect to term of office, shall not be deemed to create contract rights.

Under Ohio law appellant had no contract rights based on his election to the position of secretary-treasurer.

We find no genuine issue as to any material fact regarding the legality of the discharge, the absence of contract

rights, or the issue of punitive damages, and with respect to appellant's first four assignments of error we determine that the summary judgment was properly granted under Civ. R. 56.

The fifth assignment of error asserts that the trial court was in error in not finding Shur-Good's vacation plan to be a vested plan rather than a contingent plan. Under a vested plan an employee has a vested right to vacation pay as it accrues. Under a contingent plan an employee has a right to vacation pay only if he is an employee of the company at the time the vacation is to be taken.

I.R.C. sections require a formal written election by the company to establish a contingent plan; no election is required for a vested plan. Appellant admits that Shur-Good's predecessor made such an

election on its 1972 federal income tax return. Thus, a contingent plan was established. The trial court correctly found no genuine issue of material fact regarding the matter of appellant's claimed additional vacation pay, and the fifth assignment of error is overruled.

The judgment below is affirmed.

PALMER, P. J., KEEFE and DOAN, JJ.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX B

Notice of Appeal to the Supreme Court
of the United States

From a Judgment or Appealable Order

THE SUPREME COURT OF OHIO
Case No. 82-298

Court Possessed of the Record:

COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO
Case No. C810046

JOHN B. MILES :
3816 Roswell Avenue
Cincinnati, Ohio 45211 :

Plaintiff-Appellant : NOTICE OF APPEAL

-vs- :

THE SHUR-GOOD BISCUIT CO., INC. :
5035 Winton Road
Cincinnati, Ohio 45232 :

and :

DONALD C. SCHMITT :
5035 Winton Road
Cincinnati, Ohio 45232 :

Defendants-Appellees:

Notice is hereby given

that John B. Miles, Plaintiff-Appellant, hereby appeals to the Supreme Court of the United States from the Supreme Court of Ohio which dismissed the appeal as of right from the Court of Appeals, First Appellate District, Hamilton County, Ohio, on the 7th day of April, 1982. Appellant now appeals to the Supreme Court of the United States from the judgment of the Court of Appeals, First Appellate District, Hamilton County, Ohio, entered on the 30th day of December, 1981, and in which the judgment of the Honorable Judge Robert H. Gorman, Court of Common Pleas, Hamilton County, Ohio, entered on the 23rd day of December, 1980, was affirmed. This case further involves a substantial constitutional question as to a right which the United States Constitution guarantees and on which the Plaintiff-Appellant appeals

as of right.

/s/ JOHN B. MILES
JOHN B. MILES,
Plaintiff-Appellant
3816 Roswell Avenue
Cincinnati, Ohio 45211
Telephone: 513-661-2851

Attorney of Record for
the Defendants-Appellees:

Mr. Thomas L. Conlan
440 Central Trust Tower
Fourth and Vine Streets
Cincinnati, Ohio 45202
Telephone: 513-621-8965

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was sent by Certified Mail, Return Receipt Requested, to the office of Thomas L. Conlan, Attorney for Defendants-Appellees, at 440 Central Trust Tower, Fourth and

Vine Streets, Cincinnati, Ohio on this 21st day of April, 1982.

/s/ JOHN B. MILES
John B. Miles